



UNITED STATES DEPARTMENT OF COMMERCE
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/593,759 06/14/00 GIVEN

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EXAMINER

PRATT, H

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 09/18/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

Application No.

09/593,759

Applicant(s)

GIVEN ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 August 2001.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-30 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-30 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

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Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

Claims 1, 20, 27, 28 are rejected under 35 U.S.C. 102(e) as being anticipated by Wang.

The claims are rejected for the reasons of record cited in the last office action under 102(a). Also, Wang discloses the hydrated form of calcium sulfate.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Braun et al. in view of Wang and Couzy and JRC KK (JP 0427189A, '189 and Lindon et al.)_o *see col. 15, l. 1-10*

The claims are rejected for the reasons of record cited in the last office action. Claim 1 has been amended to require that the calcium sulfate is in the hydrated form. However, no patentable distinction is seen in the use of the hydrated form and the unhydrated form, especially when they are suspended in water. Also Wang discloses the use of the hydrated form. Therefore, it would have been obvious to use the

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hydrated form as disclosed by Wang in the composition and process of Braun et al. for its known function of supplying calcium.

ARGUMENTS

Applicant's arguments filed 8-8-01 have been fully considered but they are not persuasive. Applicants argue that as to Lindon et al. that he does not use purified water. However, the reference states that "the metallic ions are added to distilled water in the form of water soluble salts thereof" (col. 2, lines 30-40). Applicants state that "distilled water" is synonymous with purified water on page 8 of the specification. Applicants also mineralize the water by adding calcium. Applicants argue that Lindon specifically excludes the use of sodium or potassium ions, but they may be present in the claimed invention. However, no claim is seen to the use of sodium or potassium ions. As above, no patentable distinction is seen in the use of the hydrate form of calcium sulfate (CS). Not all the claims require at least 10% of CS. It is not seen that Lindon does not provide at least 10% calcium of the US RDV because if the RDV is 800 mg, then 10% is 80 which is within the claimed amount of Lindon et al.

Applicants argue that JRC KK does contain calcium sulfate, but does not say how much is used. However, the discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a mineralized water, properties such as amounts of calcium are important. It appears that the precise ingredients as well as their proportions affect the degree of mineralization of the water, and thus are result effective variables, which one of ordinary skill in the art would routinely optimize.

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Certainly the addition of calcium to beverages is well known as is the use of calcium sulfate. Nothing has been shown that enough calcium sulfate to give a sweet taste would have been enough calcium to give 10% of the RDV. In addition, the references are now used in combination, and nothing new is seen in using 10% of a known calcium ingredient as beverages and foods are routinely fortified.

Applicants argue as to Braun that other ingredients would materially affect the present calcium fortified beverage, in particularly the taste. However, applicants in their dependent claims have added flavorants, vitamins and mineral containing preservatives thereby not being consistent in excluding other ingredients from the beverage. Nothing unobvious is seen in making a beverage with only one source of calcium and then requiring that the composition be bland. Certainly, this is an inherent feature. Attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected, and useful function. *In re Benjamin D.*

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White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

Applicants argue as to Couzy that they are not making a mineral water. However, if the mixture contains minerals, it can be said to be a mineral water. No patentable distinction is seen in a composition claim whether the minerals are added or not. Certainly, applicants are in a better position than the Office to determine if calcium from mineral rich water is in a hydrated form.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication should be directed to Helen F. Pratt at telephone number 703-308-1978.

Hp 9-17-01


HELEN PRATT
PRIMARY EXAMINER